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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 603

RENE BARDY,
Appellant,

vs.

UNITED STATES OF AMERICA
and MCA INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

JURISDICTIONAL STATEMENT

The appellant, pursuant to the United States Supreme Court Rules 13(2) and 15, files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the order denying motion for leave to intervene of the United States District Court, Southern District of California, Central Division, in question and that substantial Federal questions are presented.

Opinion Below

The United States District Court, Southern District of California, Central Division, delivered a written opinion, not officially reported, which denied a motion for leave to intervene by appellant. A copy of this opinion and the order denying the motion to intervene are included in Appendix A.

Jurisdiction

The appeal herein is from an order denying appellant's motion for leave to intervene made and entered by the United States District Court, Southern District of California, Southern Division, in a civil antitrust proceeding, wherein the United States of America was plaintiff and MCA Inc., a corporation organized and existing under the laws of the State of Delaware, was defendant.

The Order appealed from was made and entered on September 6, 1962. Notice of appeal was filed in the United States District Court, Southern District of California, Central Division, on September 27, 1962.

The Supreme Court of the United States has jurisdiction to review by direct appeal the Order complained of by the provisions of 15 U.S.C., Sec. 29, which states as follows:

> "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

The said statute sustains the jurisdiction of the Supreme Court of the United States to review the order denying appellant's motion to intervene as of right pursuant to Rule 24(a)(3), Federal Rules of Civil Procedure.

in a proceeding in which the United States of America is plaintiff. *Sutphen Estates, Inc.*, v. *United States*, 342 U.S. 19, 96 L. ed. 19, 72 S. Ct. 14; *Sam Fox Publishing Company* v. *United States*, 366 U.S. 19, 6 L. ed. 2d 604, 81 S. Ct. 1309.

In *Sam Fox Publishing Co. v. United States, supra*, the Supreme Court of the United States postponed consideration of the question of jurisdiction until the hearing of the case on the merits. 364 U.S. 801, 5 L. ed. 2d 37, 81 S. Ct. 368.

Question Presented

Whether a person with a pending action against a wholly-owned subsidiary is entitled to Rule 24(a)(3), Federal Rules of Civil Procedure, intervention in a United States civil antitrust action against the parent corporation to protect by intervention that person's interest to the assets of the subsidiary, when the express purpose of the United States civil antitrust action against the parent corporation was to terminate the operation of and dissolve the subsidiary in order to dissipate the restraint in violation of the antitrust laws allegedly effectuated by the parent corporation's control and domination of the subsidiary and ten days after the antitrust action was commenced an order was entered upon stipulation between the United States and the parent corporation, which in force and effect terminated further operation of the subsidiary and disposed of its going concern assets?

Statutes Involved

In this case, appellant, Rene Bardy, claims that he was denied the right of intervention pursuant to Rule 24(a)(3), Federal Rules of Civil Procedure, which reads as follows:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

The antitrust proceeding in which appellant applied for intervention pursuant to Rule 24(a) (3), Federal Rules of Civil Procedure, was governed by the following statutes:

Sherman Act, Section 1, July 2, 1890, Chapter 647, Sec. 1, 26 Stat. 208, 15 U.S. Code, Sec. 1:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal

Sherman Act, Section 2, July 2, 1890, Chapter 647, Sec. 2, 26 Stat. 209, 15 U.S. Code, Sec. 2:

"Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

Sherman Act, Section 4, July 2, 1890, Chapter 647, Section 4, 26 Stat. 209, 15 U. S. Code, Sec. 4:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United

States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

Statement of the Case

The appellant, Rene Bardy, filed a motion to intervene in a civil antitrust proceeding to protect his rights to assets of MCA Artists, Ltd., a wholly-owned subsidiary of MCA Inc.

The United States filed the antitrust action against MCA Inc. on July 13, 1962. The complaint alleged *inter alia*, that MCA Inc. has conspired to monopolize, and has attempted to monopolize, the talent agency business in violation of Sections 1 and 2 of the Sherman Act. The plaintiff prayed that said conspiracy and attempt be adjudged in violation of the Sherman Act, and that the restraints thus effectuated be remedied by dissolution of the defendant's subsidiary, MCA Artists, Ltd., and by cancellation of the talent representation contracts and package representation contracts held by said subsidiary, MCA Artists, Ltd. The complaint further alleged that MCA Artists, Ltd., was a talent agency engaged in the representation of talent and of their respective production companies in all fields of the entertainment industry and that it also represents or sells television programs to networks, sponsors and advertising agencies.

A temporary restraining order was entered on July 13, 1962, wherein it was recited that MCA Inc. was about to consummate divestiture of its talent agency business on or before July 18, 1962 and which restrained MCA Inc. from divesting and from taking any further action to consummate the proposed divestiture by MCA Inc. of any of the stock, properties or assets of any of its talent agency subsidiaries or affiliates.

A subsequent motion by MCA Inc. to vacate and dissolve said temporary restraining order was denied on July 17, 1962.

On July 23, 1962, ten days after the antitrust action was commenced, an order was entered upon stipulation between the United States of America and the parent corporation, MCA Inc., which in force and effect terminated further operation of the talent agency of MCA Artists, Ltd. by termination of all talent representation and package agency contracts with any client in the entertainment industry and prohibition against re-engaging in or having any financial interest in the talent agency business. Said order added: "Nothing herein shall impair the rights, if any, or obligations of third parties."

On August 20, 1962, the appellant, Rene Bardy, filed a motion to intervene in said civil antitrust proceeding, based in part upon the assertion of rights under Rule 24(a)(2) Federal Rules of Civil Procedure.

Appellant, Rene Bardy, was plaintiff in two separate actions against MCA Artists, Ltd., pending before the United States District Court for the District of Nevada, both of which actions had been consolidated. Said actions had been filed in March, 1961. On March 10, 1962, the Court had limited the time for discovery by all parties to June 10, 1962. MCA Artists, Ltd. had petitioned the court

for additional time for discovery; the request was denied by Order dated May 22, 1962.

In his motion to intervene, to which was annexed a proposed intervenor's claim, appellant, Rene Bardy, alleged that the termination of the valuable talent representation contracts by MCA Artists, Ltd., the wholly-owned subsidiary of MCA Inc., was made without consideration, except the consideration received by MCA Inc. in the defense of said antitrust action; that this jeopardized the position of appellant in his actions against MCA Artists, Ltd., the wholly owned subsidiary of MCA Inc.; that the force and effect of the termination of the valuable talent representation contracts and the resulting loss of future commissions would hinder and delay Rene Bardy in the collection of any judgment he would obtain in his actions in the United States District Court for the District of Nevada; that appellant's claim as intervenor had neither the purpose nor effect of impairing the full and absolute control by the United States of America over the prosecution and settlement of said antitrust action; that no extraneous issues would encumber the orderly prosecution of the antitrust ac[illegible] since appellant was merely attempting to secure adequate protection from the liquidation of the remaining assets of MCA Artists, Ltd., beyond the reach of appellant and thereby make such assets available for the collection of any judgment appellant may recover in the actions then pending in the United States District Court for the District of Nevada. The intervenor's claim prayed that MCA Artists, Ltd., should be required to retain sufficient assets to satisfy any judgment obtained by Rene Bardy or that MCA Artists, Ltd. or MCA Inc. should be required to post sufficient bond to protect Rene Bardy in the event he is successful in his actions against MCA Artists, Ltd., the wholly-owned subsidiary of MCA Inc.

The United States of America filed a memorandum in opposition to appellant's motion to intervene.

MCA Inc. filed a statement in opposition to appellant's motion to intervene, supported by an affidavit, which recited *inter alia* the following:

(1) MCA Artists, Ltd., has very substantial sums payable to it by its former clients for past services rendered; (2) there have been no steps taken, and no present intention to take any steps to dissolve or liquidate MCA Artists, Ltd.; (3) if such were to take place, the dissolution or liquidation would have to take place under Delaware law, which in conformance with general corporate law, requires the rights of creditors to be protected; (4) MCA Artists, Ltd., has and will have ample assets to cover any possible recovery by Rene Bardy; (5) MCA Inc., the parent corporation, is a responsible company which is actively engaged in business and the stock of which is listed on the New York Stock Exchange and is able to respond to any judgment which Rene Bardy might recover in his pending Nevada litigation "to the extent it might be responsible therefor"; (6) MCA has insurance coverage with respect to the causes of action raised by Rene Bardy in the Nevada litigation and the insurance carrier for the company is handling the defense of the action "under a reservation of rights".

Appellant, Rene Bardy, filed a motion to strike the affidavit filed by MCA Inc. in opposition to appellant's motion to intervene upon the grounds that (1) The allegations of intervenor's claim and the motion to intervene should be accepted as true for the purpose of ruling on the motion to intervene and therefore said affidavit which contained conclusions relevant to the intervenor's claim was argumentative and incompetent as a basis for op-

position to the motion, and (2) the affidavit contained legally incompetent conclusions unsupported by facts, including but not limited to the specific six statements to which reference is made hereinabove.

An order was made and entered on September 6, 1962, denying appellant's motion for leave to intervene and denying appellant's motion to strike the MCA Inc. affidavit.

The Federal Question Presented Is Substantial

The question presented by this appeal is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution for the following reasons:

1. The scope of Rule 24(a) (3), Federal Rules of Civil Procedure, should be determined in the light of those standards heretofore prescribed by the United States Supreme Court in *Sutphen Estates, Inc., v. United States*, 342 U.S. 19, 22, 96 L. ed. 19, 72 S. Ct. 14.

2. The definition of "interest" sufficient to entitle a person to intervention pursuant to Rule 24(a) (3), Federal Rules of Civil Procedure, should be determined, where an order that was entered upon stipulation in a United States government civil antitrust proceeding in force and effect deprived the applicant for intervention of an opportunity to impress a lien upon the assets of a wholly-owned subsidiary of the antitrust defendant, because the assets of said subsidiary were disposed of by the stipulation of the antitrust defendant without consideration, except the consideration received by the parent corporation in the defense of the antitrust action.

3. The nature of the judicial process of shaping an order upon consent of the parties to a federal antitrust

proceeding should be formulated with respect to consideration of the practical economic rights of claimants and creditors. See *United States* v. *The United Shoe Machinery Co.*, D. Mass. 1953, 110 F. Supp. 295, 348.

4. The nature of the judicial process of shaping an order upon consent of the parties to a federal antitrust proceeding should be formulated with respect to the lack of control over the disposition of assets pursuant to the order as compared with the type of control exercised by federal courts in proceedings under the Federal Bankruptcy Act, the Chapter X reorganization statute and the Public Utility Holding Company Act, 15 U.S.C.A. § 79 k.

5. The status of a person applying for intervention as a claimant in a federal antitrust proceeding should be clarified, where in effect the applicant for intervention has been relegated to a position inferior to that of a "creditor" within the purview of Section 1 of the Uniform Fraudulent Conveyance Act, Vol. 9B, Uniform Laws Annotated, page 55, and an order has been entered upon consent of the parties to the federal antitrust proceeding which disposes of assets of a wholly-owned subsidiary of the antitrust defendant without consideration, except the consideration received by the parent corporation in the defense of the antitrust action.

6. The determination of the scope of Rule 24(a)(3), Federal Rules of Civil Procedure, has been the subject of recent decisions of the Court of Appeals of the Second Circuit, *International Mortgage & Investment Corp.* v. *Von Clemon*, (1962) 301 F.2d 857, and the Court of Appeals of the Ninth Circuit, *Formulabs Inc.* v. *Hartley Pen Co.*, (1960) 275 F.2d 52, and is an important Federal question for the United States Supreme Court.

Conclusion

Therefore, it is respectfully submitted that this Court has jurisdiction of this appeal under 15 U.S.C., Sec. 29, and that a Federal question is presented which is substantial and of public importance.

Respectfully submitted,

MORTON R. GALANE
130 South Fourth Street
Las Vegas, Nevada

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MCA, INC., Defendant.	Civil No. 62-942-WM

Order Denying Motions for Leave to Intervene, and to Strike Affidavit

(Filed September 6, 1962.)

This cause having come before the Court for hearing upon (1) the motion of Rene Bardy, filed August 20, 1962, for leave to intervene as a claimant, pursuant to Rule 24(a)(2) and (3) and Rule 24(b)(2) of the Federal Rules of Civil Procedure, and (2) the motion of Rene Bardy, filed August 29, 1962, to strike the affidavit of Allen B. Susman, filed August 24, 1962, in opposition to the motion to intervene; and the motions having been submitted for determination pursuant to Local Rule 3(c); and it appearing to the Court that there is no ground either for intervention of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure (see *San Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); *Sutphen Estates, Inc.*, v. *United States*, 342 U.S. 19 (1951); *United States* v. *California Co-operative Canneries*, 279 U.S. 553 (1929); cf. *Formulabs, Inc.*, v. *Hartley Pen Co.*, 275 F.2d 52 (9th Cir.), cert. denied 363 U.S. 830 (1960)), or for permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Pro-

cedure [see *Allen Calculators* v. *National Cash Register Co.*, 322 U.S. 137 (1944)];

IT IS ORDERED that the motions of Rene Bardy for leave to intervene, and to strike the affidavit of Allen B. Susman, are hereby denied.

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail upon the parties appearing in this cause.

September 6, 1962.

Wm. C. Mathes
United States District Judge

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OCTOBER TERM, 1962
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RENE BARDY,

Appellant,

vs.

UNITED STATES OF AMERICA and MCA INC.,

Appellees.

On Appeal From the United States District Court,
Southern District of California, Central Division.

MOTION TO DISMISS.

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Appellees.

On Appeal From the United States District Court, Southern District of California, Central Division.

MOTION TO DISMISS.

Motion.

Appellee, MCA Inc., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal of Rene Bardy on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to statute.

Statutes Involved.

The statutory provisions involved in this appeal is Federal Rule of Civil Procedure 24(a)(3) which provides that:

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (3) when the ap-

plicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof."

and 15 U.S.C. Section 29 which provides that:

"In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

Statement.

Appellee MCA Inc., (hereinafter referred to as "MCA") is a Delaware corporation which either directly or through its subsidiaries engages in the production of films, television programs, leases studio facilities to motion picture and television producers, distributes television programs to networks and to television stations, and until recently engaged in the representation, as a talent agent, of artists and production companies in various branches of the entertainment industry. MCA Artists, Ltd. (hereinafter referred to as "Artists"), a Delaware corporation, is a subsidiary of MCA and until recently was engaged primarily in the representation, as a talent agent, of artists and production companies.

During March 1962 Rene Bardy (hereinafter referred to as "Appellant") brought two actions now pending in the United States District Court for the District of Nevada against, among others, Artists, claiming that

Artists failed properly to perform its duties as his theatrical agent in connection with his problem with a Las Vegas hotel concerning a show at the hotel with which show Mr. Bardy was associated. This protracted litigation has already resulted in a voluminous court file and is still in the discovery stage.

In July 1962 the United States filed a civil complaint in the Southern District of California against MCA alleging violations of the Sherman and Clayton Acts. Soon thereafter MCA and the Government entered into a stipulated order which required MCA and its subsidiaries to terminate their various guild franchises and to cease acting as talent agents. After the entry of the aforementioned interlocutory order appellant sought to intervene in the antitrust action. He alleged in a pleading entitled "Intervenor's Claim" that "MCA Artists, Ltd., as a wholly owned subsidiary of MCA, Inc., has disposed of valuable rights to talent representation contracts and talent agency commissions from which substantial profits would have been derived by MCA Artists, Ltd. Said commissions and profits were assets to which Rene Bardy would look to satisfy any judgment he may recover in his actions in the United States District Court for the District of Nevada . . . [and that] the release by MCA Artists, Ltd. of valuable talent representation contracts and agency commissions, without consideration, and the liquidation by MCA, Inc., of its wholly owned subsidiary MCA Artists, Ltd., will hinder delay and defraud Rene Bardy in the collection of his just claim against MCA Artists, Ltd."

On September 6, 1962 the District Court for the Southern District of California denied appellant's motion for leave to intervene.

On October 18, 1962 a final judgment was entered by the District Court for the Southern District of California in the antitrust action, pursuant to stipulation of the parties. This final judgment continued the earlier injunction against MCA or its subsidiaries acting as talent agents, but in no way required the dissolution of Artists or the disposition of its assets.

Question Presented.

May any person who alleges only that he is the holder of an unliquidated claim against a subsidiary corporation intervene as of right in an antitrust proceeding brought by the United States against the subsidiary's parent corporation on the ground that the applicant for intervention is a person "so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof"?

ARGUMENT.

These proceedings are an instance in which the threshold question of the jurisdiction of this Court and the issue on the merits are identical. If the district court was, as we contend, correct in holding that appellant is not entitled to intervene as of right, the district court's determination is not appealable and hence this appeal should be dismissed. See *Sutphen Estates, Inc. v. United States*, 342 U. S. 19 (1951); *Sam Fox Publishing Co. v. United States*, 366 U. S. 683 (1961). For the reasons which we shall set forth it is evident that the appeal taken by Mr. Bardy is frivolous and that this Court should dismiss the appeal at this time rather than postponing consideration of the jurisdictional question.

1. Appellant Does Not Have the Kind of Interest Which Is Protected Under Federal Rule of Civil Procedure 24(a)(3).

Appellant's only interest in the antitrust action in which he seeks to intervene is predicated on a series of hypothetical contentions commencing with the assertion that as the alleged holder of an unliquidated claim for damages sounding primarily in tort, he may at some future date be successful in obtaining judgments in his actions in Nevada, that MCA may cause the dissolution of its subsidiary and may distribute the subsidiary's assets, that MCA may not make provisions for creditors' claims in connection with such distribution, and accordingly that he may not be able to collect his judgments. Rule 24(a)(3) is not intended to protect such a remote interest. The practice of permitting intervention by

third parties, now embodied in Rule 24(a)(3) is an outgrowth of the examination *pro interesse suo* in equity, in which a person claiming an interest in property in *custodia legis* was permitted to intervene. See 4 MOORE, FEDERAL PRACTICE ¶24.03 (hereinafter this volume of Moore's is referred to as "4 MOORE"). The promulgation of Rule 24(a)(3) has not changed the necessity for an applicant to establish that he has an interest in the specific property recognized and protected by law sufficient to be denominated a lien, equitable or legal. See 4 MOORE ¶24.09. See also *United States v. Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 120 (D. Del. 1939), *appeal dismissed sub nom. Missouri-Kansas Pipe Line Co. v. United States*, 108 F. 2d 644 (3d Cir. 1939), *cert. denied*, 309 U. S. 687 (1940).

This principle is clearly established by *Vaughan v. Dickinson*, 19 F. R. D. 323 (W. D. Mich. 1955), *aff'd per curiam sub nom. Duffy v. Vaughan*, 237 F. 2d 168 (6th Cir. 1956). In the *Vaughan* case James A. Vaughan was a party to a class suit against one Albert Dickinson. A compromise was negotiated wherein Dickinson paid $100,000.00 into court in settlement of the claims of the plaintiffs in the class action. Vaughan was, of course, entitled to share in the funds on deposit in the court. In another unrelated action judgment was had by one Duffy, a trustee, against the same James A. Vaughan. Duffy sought leave to intervene in the class action in which Dickinson was the defendant, pursuant to Rule 24(a)(3). Duffy asserted a judgment lien against any sums of money that might be payable in the class action to Vaughan alleging that unless he, Duffy, were permitted to intervene he,

might suffer irreparable loss. The court held that Duffy was not entitled to intervene stating that:

> "Duffy, trustee, would have to have some interest in the results of the present litigation between the plaintiffs and defendants in order to support his motion for intervention of right. It is clear that he has no direct interest in the results of this litigation between the plaintiffs and defendants. In other words, Duffy, trustee, is not in any sense a party to the issues involved in this action." 19 F. R. D. at 328.

See also *Board of Commissioners of Sweetwater County, Wyoming v. Bernardin*, 74 F. 2d 809 (10th Cir. 1934), *cert. denied*, 295 U. S. 731 (1935). In *Sweetwater*, lessors claimed that they had an absolute right to intervene in a proceeding, the purpose of which proceeding was to determine the priority of tax payments which were due from the lessee. The lessors alleged that the leases were all subject to forfeiture by the lessors for failure by the lessee to pay all taxes assessed against the land and wished to oppose a claim by certain bond holders that the bond holders were entitled to priority. The lessors stated that they wished to intervene in order to preserve the assets of the lessee (who was in receivership). The court dismissed an appeal brought by the lessors from an order denying them leave to intervene, stating that the lessors had no *direct* interest in the subject matter of the claim for taxes and hence intervention was discretionary and the trial court's denial thereof was not appealable.

Certainly if the interest of a lessor in the preservation of the assets of his lessee (who at the very time was in receivership) is not sufficient to permit inter

vention as of right in a proceeding the result of which could deplete the assets of the lessee, and if the interests of a judgment creditor in a sum of money being held in court for the benefit of the judgment debtor is insufficient to permit intervention as of right in the proceeding in which the funds are being held, then the undetermined rights, if any, of the alleged holder of an unliquidated claim hardly support intervention as of right in an antitrust proceeding. See 4 Moore ¶24.09 at page 89.

In *United States v. California Cooperative Canneries*, 279 U. S. 553 (1929), the Canneries sought to intervene in the trial court on the ground that a consent decree entered into between defendants in antitrust litigation and the Government interfered with performance by one of the defendants of a contract between that defendant and the Canneries. The Supreme Court granted certiorari to review the court of appeals reversal of the trial court's denial of a [illegible] to intervene. The Court held that the court of appeals improperly entertained the appeal from the trial court saying that the court of appeals has not referred

> "to the decisions which hold that an order denying leave to intervene is not appealable . . . except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit." 279 U. S. at 556.

There are no reported decisions of which we are aware which conflict with, or in any way derogate from, the holdings of the above cited cases. The two decisions cited by appellant at page 10 of his Jurisdictional Statement as involving the scope of Rule 24(a)(2) do not lend any support to appellant's contention

that he is entitled to intervene as of right in these antitrust proceedings. *International Mortgage & Investment Corp. v. Von Glahn*, 301 F. 2d 857 (2d Cir. 1962), involved a situation in which the applicant for intervention claimed to be the owner of specific property which was under the trial court's control, and in *Formulabs, Inc. v. Hartley Pen Co.*, 275 F. 2d 52 (9th Cir. 1960); *cert. denied*, 363 U. S. 830 (1960), the applicant for intervention claimed to be the owner of the secret formula which was subject to court control. Certainly appellant derives no comfort from *Sulphur Estates, Inc. v. United States*, 342 U. S. 19 (1951), in which the applicant for intervention who was denied the right to intervene was the owner and lessor of properties which were involved in a court supervised reorganization pursuant to antitrust decree.

Appellant claims no legal or equitable interest in any specific assets of MCA or Artists. Indeed he stands no higher in position than any other person with a real or fancied unliquidated claim against Artists. If appellant is entitled to intervention in order to require the trial court to order Artists and MCA to post a bond to secure the possible payment of appellant's unliquidated claim, then every other creditor and alleged creditor of the Artists is entitled to the same.

Appellant's position misconceives entirely the status of unsecured creditors. By hypothesis such persons have no interest in any specific assets of their debtor. What appellant seeks to do is to have the trial court in this antitrust proceeding grant him in effect a secured interest when the court in which he is trying his primary case—the District Court for the District of Nevada—does not afford him such a remedy.

2. Appellant Is Not so Situated as to Be Adversely Effected by the Action of the Trial Court.

MCA and its subsidiary, Artists, have already terminated their activities as talent agents. Obviously these two corporations cannot be forced back into the agency business now, and we do not understand that appellant seeks this; nor can appellant object to the decree of the District Court in so far as it enjoins MCA and its subsidiary from engaging in the future in the business of being talent agents. What apparently concerns the appellant is the possibility that MCA will now liquidate Artists and in so doing place the remaining assets of Artist beyond the reach of creditors or potential creditors. However, nothing has occurred in these proceedings which in any way affects or determines the disposition of the assets of Artists. Artists is a Delaware corporation, and if MCA decides to dissolve Artist the dissolution would have to be effected pursuant to the mechanics of Delaware law. Section 278 of the Delaware Corporation Law provides for a continuation of a corporation's existence after dissolution for the purpose of winding up its affairs, and until judgments are fully executed against the assets of the dissolved corporation. Section 279 provides for the appointment of receivers and Section 281 provides for the payment by the receivers of corporation debts. Appellant's protection are thus found in the law of the State of Delaware dealing with the dissolution of corporations. Plainly, appellant can not show that intervention is necessary to prevent the trial court's process from seriously jeopardiz-

ing his rights. Under these circumstances he is not entitled to intervene under Rule 24(a)(3). See *Mason v. Cathedral Building Corp.*, 125 F. Supp. 542 (D. C. Alaska 1954); 2 BARRON & HOLTZOFF, FED. PRACTICE AND PROCEDURE, §598, page 385.

3. There Was No Property "in the Custody or Subject to the Control or Disposition of the [Trial] Court or an Officer Thereof."

The *in personam* jurisdiction exercised by an anti-trust court over corporate defendants does not confer upon such a court the kind of custody or control of specific property which is necessary to sustain intervention under Rule 24(a)(3). See *United States v. American Society of Composers, Authors, Publishers*, 11 F. R. D. 511 (S. D. N. Y. 1951). See also *United States v. Columbia Gas & Electric Corp.*, *supra*, at page 6, and *United States v. Schofield*, 175 F. Supp. 654 (E. D. Pa. 1959).

Conclusion.

In order to be entitled to intervene as of right under Rule 24(a)(3), an applicant for intervention must have demonstrated all of the following:

1. That he has a sufficient interest in the property which is the subject matter of the litigation; and

2. That he will be adversely affected by the court's action; and

3. That there is property which is in the custody or subject to the disposition or control of the court.

If an applicant fails to establish any of these prerequisites he does not qualify for intervention as of right under Rule 24(a)(3).

In this case appellant has failed to meet *any* of the requirements for intervention under Rule 24(a)(3). The most that can be said for appellant is that at some time in the future he may or may not become a general creditor of Artists. We respectfully submit that under these circumstances there is clearly no need for a plenary consideration by this Court of the jurisdictional issue raised by the appeal, and accordingly this Court should dismiss the appeal for want of jurisdiction.

Respectfully submitted.

BELLENSON, MEYER, ROSENFELD & SUSMAN,
By ALLEN E. SUSMAN and
JEFFREY L. NAGIN,
Attorneys for Appellee MCA Inc.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 663

RENE BARDA, APPELLANT

v.

UNITED STATES OF AMERICA AND MCA INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION OF THE UNITED STATES TO DISMISS

Pursuant to Rule 16(1)(a) of the Revised Rules of this Court, the United States moves that the appeal be dismissed.

STATEMENT

This is a direct appeal from an order denying intervention in a government civil antitrust suit. The motion for leave to intervene was made and denied under the following circumstances:

On July 13, 1962, the United States filed a civil antitrust action (R. 2), against appellee MCA, Inc. ("MCA"). The suit named certain of its subsidiaries, including MCA Artists, Ltd. ("Artists"), as co-conspirators. The complaint alleged that MCA and its subsidiaries have a substantial share of the talent

agency business and represent most of the important motion picture talent in all entertainment fields as actors, directors, writers, musicians, than any other talent agency; and that they are also the principal producers and sellers of network television programs. The complaint charged, among other things, that MCA combined and conspired to restrain and to monopolize the talent agency business, the production of television network programs, and the sale of television network programs to prime time, in violation of Sections 1 and 2 of the Sherman Act. The relief requested included the dissolution by MCA of Artists, which was engaged in the talent agency business, and all other talent agency subsidiaries and affiliates, and an injunction against MCA engaging in the talent agency business.

The United States simultaneously filed a motion for a temporary restraining order (R. 19) to enjoin MCA from taking any action to divest itself of Artists, or any other talent agency subsidiary, on the ground that a decree relief against the violations alleged in the

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The talent agency business was described in the complaint as consisting of representing actors, actresses, producers, directors and performing talent in the entertainment business, in exchange for 10 per cent commissions on gross earnings. (R. 4, Complaint, Par. 10). "Talent" was defined in the complaint (Par. 11, R. 5) as meaning actors, actresses, producers, directors and writers who have achieved professional recognition by the entertainment industry and by the public through professional experience in motion pictures or television.

The complaint also charged that MCA had violated Section 7 of the Clayton Act by acquiring a controlling interest in Decca Records, Inc., the fourth largest recording company in the United States, and its subsidiary, Universal Pictures Company, Inc., a leading motion picture film producer.

complaint might be thwarted by unilateral action. The district court granted this motion (R. 25), and, after hearing (R. 25), denied MCA's motion to vacate and dissolve the temporary restraining order (R. 32).

By stipulation and order entered on July 23, 1962 (R. 98-103), MCA and its subsidiaries were required, among other things, to take steps immediately to terminate their talent agency contracts and also to cease acting as talent agents. The order expressly reserved their right to receive compensation and commissions for past services (Par. 4), and provided that the rights and obligations of third parties were to remain unimpaired (Par. 11).

On August 20, 1962, appellant moved to intervene (R. 114-167), both as of right and on a permissive basis, under Rule 24 of the Federal Rules of Civil Procedure. His claim for intervention alleged, in substance, that he was the plaintiff in two damage suits in the United States District Court for the District of Nevada against Artists, among others, arising out of its alleged failure to perform its duties as his talent agent; that pursuant to the foregoing stipulation and order of July 23, Artists had terminated its talent agency contracts from which substantial commissions and profits would have been derived; that the government's complaint in the antitrust suit sought the dissolution of Artists and that the effect of the stipulation and order of July 23 had been to put Artists out of the talent agency business; that Artists had no reason to remain in existence and that it would be liquidated and dissolved and its assets transferred to MCA, its parent; that, as a consequence of

the foregoing, the collectibility of any judgment [illegible] might obtain in his Nevada suits was placed in [illegible] and that he was therefore entitled to intervene in order to postpone the posting of a bond or the retention of sufficient assets by Artists to satisfy any judgment he might obtain.

Both the United States (R. 184) and MCA (R. 193) opposed the motion to intervene. MCA filed an affidavit (R. 217) which stated, among other things, that Artists "remains an existing corporation and it is still able to respond to any judgment which M. Bardy [appellant] may recover * * *," and that (R. 217-218):

> (1) MCA Artists, Ltd. has very substantial sums payable to it by its former clients for past services rendered; (2) there have been no steps taken, and no present intention to take any steps, to dissolve or liquidate MCA Artists, Ltd.; (3) in any event, if such were to take place, the dissolution or liquidation would have to take place under Delaware law, which in common with general corporate law, requires the rights of creditors to be protected. MCA Artists, Ltd. has and will have ample assets to cover any possible recovery by M. Bardy * * *

The district court denied the motion to intervene [illegible] (R. 223, App. A1) that "there is no ground either for intervention of right pursuant to Rule 24(a) [illegible] for permissive intervention pursuant to Rule 24(b) [illegible] this appeal challenges only the denial [illegible] appellant to [illegible] (R. 223; J.S. App. A2).

nial of intervention as of right under Rule 24(a) (R. 237; J.S. 3).

ARGUMENT

The district court correctly denied appellant intervention as of right. Rule 24(a)(3), the sole provision upon which appellant relies (J.S. 3, 9, 10), grants a right to intervene "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." To come within this provision, an applicant must show (1) that he has a legally protected interest in the property subject to the control of the court and (2) that the court's disposition of the property will unduly prejudice his interest in the property. *See United States* v. *California Cooperative Canneries*, 279 U.S. 553, 556; *International Mortgage & Investment Corp.* v. *Von Glahn*, 201 F. 2d 857, 862 (C.A. 2); *Board of Commissioners of Sweetwater County, Wyo.* v. *Hampton*, 71 F. 2d 913, 915, 916 (C.A. 10), certiorari denied, 293 U.S. 71; *Rockford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940, 943 (C.A. 4); *In re Grand Union Tea Co.*, 73 F. Supp. 242, 243 (S.D.N.Y.); Moore, *Federal Practice*, 2d Ed., ¶ 24.09[2].

Appellant does not claim that [illegible] intervention under Rule 24(a)(3). He does not claim a protected interest in Artists' property; he has only

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A consent judgment was entered in the district court on October 18, 1962. The judgment enjoined Mr. Ward from [illegible] salaries from, among other things, [illegible] interest in the talent agency business, but expressly preserved their right to receive compensation and commissions for past services.

an unadjudicated claim against the company, now the subject of pending litigation, on which he may never prevail. Nor has appellant shown that he will be "adversely affected" by the termination of Artists' talent agency contracts. For the order and stipulation of July 23 expressly preserve Artists' right to receive the substantial compensation now owing to it for past services (see MCA's affidavit, *supra*, p. 4); and Artists, as a Delaware corporation, would be required to protect the rights of creditors if it were dissolved. 8 Del. C. §§ 275 *et seq.* In these circumstances, the curtailment of Artists' future earning power which may result from termination of its talent agency is not sufficient to show that its financial ability to satisfy any judgment appellant may obtain against it would be impaired. Cf. *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, 22.

CONCLUSION

Since appellant was not entitled to intervene as of right, the order denying intervention is not appealable and the appeal should be dismissed. *Sun Ex Publishing Co.* v. *United States*, 366 U.S. 683, 687 n.8, 695; *Sutphen Estates, Inc.* v. *United States*, *supra*.

Respectfully submitted.

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DECEMBER 1962.

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JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 603.

RENE BARDY,
Appellant,

vs.

UNITED STATES OF AMERICA
and MCA INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS.

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SUPREME COURT OF THE UNITED STATES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS.

The consent order below,[1] though boldly professing to protect third parties, which includes the appellant, Rene Bardy, did not spell out the effective machinery giving the professed protection, but was a hollow shell

"Nothing herein shall impair the rights, if any, of third parties"

[1] Order dated July 23, 1962, certified as pages 93 to 105, inclusive, of the record on appeal.

The Government states that creditors of MCA Artists, Ltd., are protected.[2]

MCA Inc. states that creditors of MCA Artists, Ltd., are protected.[3]

Appellant, a creditor, cannot find that protection upon the face of the order.[4]

If the order had spelled out what the appellees now assert it states, the appellant, Rene Bardy, would not have sought intervention.

De facto liquidation does not depend upon formal dissolution. The ways to dissipate corporate assets are too numerous to mention.

MCA Inc. has sacrificed its wholly-owned subsidiary, MCA Artists, Ltd., as part of its bargaining power to settle the antitrust litigation brought by the United States Government. Innocent third parties should not be sacrificed to aid MCA Inc. to dispose of its antitrust action.

Jeopardy to the creditors of MCA Artists, Ltd., provokes a substantial Federal question. This appeal is not frivolous. Appellant, Rene Bardy, is entitled to be heard upon the merits.

The motion to dismiss should be denied.

Respectfully submitted,

MORTON R. GALANE
Attorney for Appellant

2. Page 6, Motion to dismiss filed by the United States.
3. Page 10, Motion to dismiss filed by MCA Inc.
4. Final consent judgment entered October 18, 1962, certified [illegible] to 23, inclusive, of the supplemental record on appeal.